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No. 85-748

In the Supreme Court of the United States

OCTOBER TERM, 1985

GEORGE A. KELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDU[illegible]M FOR THE UNITED STATES [illegible]N OPPOSITION

Petitioner, a former employee of the National Aeronautics and Space Administration (NASA), argues that the courts below erred in dismissing his suit for reinstatement and back pay on the ground that he had voluntarily retired and received retirement benefits.

1. a. In 1972, petitioner was employed as an aerospace engineer at Marshall Space Flight Center in Huntsville, Alabama, when, as part of a major reduction-in-force, his position was abolished. NASA offered petitioner reassignment to another position as an aerospace engineer, a position commensurate in

grade and similar in responsibility to his former position. Petitioner initially accepted the reassignment, but, after receiving a memorandum describing his first assignment in the new position, petitioner elected to discontinue service and to apply for retirement benefits. Petitioner's separation from service became effective June 30, 1972. He then applied for and was granted an immediate retirement annuity. Pet. App. 24-26.

b. Petitioner appealed his separation to the Civil Service Commission.[1] He made five arguments, including a claim that NASA was required to offer him a new position but had not done so because he was not qualified for the aerospace engineer position he was offered. The Commission rejected petitioner's claims. Following exhaustion of his administrative remedies, petitioner commenced this action for reinstatement and back pay in the United States District Court for the Northern District of Alabama, alleging that the Commission's decision was arbitrary and unsupported by the evidence. The district court remanded the case to the Commission in 1976 for additional findings because the administrative decisions had not adequately responded to petitioner's claim that he was not qualified for the aerospace engineer position and had not responded at all to some of his other claims. Upon remand, the Commission again denied petitioner relief. Pet. App. 137-139, 158.

Petitioner again sought review in the district court, which reversed the Commission's decision in 1981. The court held that the Commission's decision that

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[1] Pursuant to the Civil Service Reform Act of 1978, the Civil Service Commission was reorganized as the Merit Systems Protection Board and the Office of Personnel Management. Pub. L. No. 95-454, 92 Stat. 1111 *et seq.*

petitioner was qualified for the aerospace engineer position was not supported by substantial evidence. Alternatively, it reversed the administrative decision as a sanction "to punish the administrative agency for its failure to respond, as ordered by this court, to all of the issues raised" by petitioner. The court ordered petitioner reinstated with back pay. Pet. App. 76-77.

The government appealed the district court's decision to the Eleventh Circuit arguing, inter alia, that because the back pay award sought by petitioner exceeded $10,000, the United States Claims Court had exclusive jurisdiction to adjudicate the claim. See 28 U.S.C. 1346(a)(2), 1491. The Eleventh Circuit agreed and, accordingly, transferred the case to the Claims Court. Pet. App. 44-55.

c. Petitioner then filed his complaint in the Claims Court, again alleging that the reduction-in-force action violated applicable regulations because he was improperly offered a position for which he was not qualified. The government moved for dismissal on the ground that petitioner was barred from seeking reinstatement and back pay because he had retired voluntarily and received a retirement annuity. The Claims Court found that petitioner's claim was governed by *Brown* v. *United States*, 2 Cl. Ct. 586, 587 (1983), aff'd, 732 F.2d 167 (Fed. Cir. 1984) (Table), which held that where an employee has accepted retirement, he is precluded from seeking reinstatement and back pay. The only exceptions to the rule stated in *Brown* "are where the retirement was involuntary because it was obtained by coercion or because the employee was affirmatively misled as to the effect of accepting retirement" (2 Cl. Ct. at 587). The Claims Court concluded that petitioner had voluntarily surrendered all claims to his former position by apply-

ing for and accepting retirement benefits and that petitioner's retirement was not the result of coercion or deception on the part of his former employer. Accordingly, the Claims Court granted summary judgment in favor of the government. Pet. App. 29-33.[2]

d. The Federal Circuit affirmed in an unpublished opinion (Pet. App. 1-4). The court held that *Brown* and *Kestner* v. *Department of the Interior*, 229 Ct. Cl. 772 (1982), firmly established the rule that "where an employee has accepted retirement he is precluded from seeking reinstatement and back pay" (Pet. App. 3, quoting *Brown*, 2 Cl. Ct. at 587). The court added that the "mere fact that none of [petitioner's] options were to his liking is irrelevant. *Taylor* v. *United States*, 591 F.2d 688, 690-691 (Ct. Cl. 1979)." In examining petitioner's contention that his retirement was involuntary, the court concluded that there was "absolutely no evidence that [petitioner] was coerced into retirement or misled as to the effect retirement would have on his rights" (Pet. App. 3). The court therefore found that petitioner's voluntary retirement "deprived the Claims Court of jurisdiction" (Pet. App. 4).

2. The decision of the court of appeals is correct, presents no conflict among the circuits, and raises no significant legal issue. Accordingly, review by this Court is not warranted.

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[2] The Claims Court noted that the government had raised "the issue of the effect of [petitioner's] application for retirement benefits upon his right to challenge the propriety of his separation from Government Service" for the first time 12 years after petitioner complained about the events that occurred in 1972. While concerned about this delay, the court held that "the Government is not estopped from raising" the argument. Pet. App. 29.

a. The ultimate disposition of this case is in line with settled law. In *Taylor*, the Court of Claims addressed the question whether an employee "who retires after his removal from the service but while his appeal from such adverse action is pending, is entitled to back pay and reinstatement if the removal action is cancelled by an administrative appellate decision" (591 F.2d at 689). The court held that an employee who voluntarily retires is not entitled to reinstatement or back pay. Rather, the "clear import of the statutes, regulations and decisional law is that a voluntary retirement, like a resignation, results in the employee's complete separation from the Federal service" (*id.* at 690). Under the applicable regulations, the administrative agency lacks "jurisdiction to act on his claim for reinstatement and back pay" if a "plaintiff's retirement was voluntary" (591 F.2d at 693). 5 C.F.R. 752.401(c)(3).

The court in *Taylor* specifically rejected a number of claims that are relevant here. First, quoting applicable personnel regulations, the court stated that "[t]he fact that the employee may be faced with an inherently unpleasant situation, or that his choice may be limited to two unpleasant alternatives, does not make the resulting action an involuntary action" (591 F.2d at 691). Second, the court rejected the plaintiff's argument that "his retirement was involuntary because he understood that it would have no effect on his rights to reinstatement and back pay and that he was not warned that these rights would be lost if he retired before the appeal was decided" (*id.* at 692). An agency has no duty to warn of such consequences, the court stated, adding that it could not deceive or mislead an employee concerning the consequences of retirement (*ibid.*).

As the courts below concluded, petitioner's claim is governed by *Taylor*, *Kestner*, and *Brown*.[3] He was faced with options he found unpleasant, including an offer of another position as an aerospace engineer, and he chose to retire. While petitioner may not have understood that he could not then pursue an appeal, his misunderstanding did not result from any deception by NASA. Therefore, the courts below correctly held that petitioner may not seek reinstatment and back pay.[4]

b. Contrary to petitioner's argument (Pet. 30-31), there is no conflict between the decision in this case and the decision of the Fifth Circuit in *Gonzalez* v. *Department of Transportation*, 701 F.2d 36 (1983). The Fifth Circuit recognized that a plaintiff like petitioner who voluntarily resigned and applied for retirement benefits lost his right to appeal (*id.* at 39). The court's decision appears to illustrate the exception to the general rule occasioned by affirmatively misleading statements by an agency. The plaintiff in *Gonzalez* received a reduction-in-force notice informing her that she was being separated from her agency. The notice stated that she had the right to

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[3] The Federal Circuit recently reaffirmed the rule that an employee who voluntarily retires may not seek back pay. *Sammt* v. *United States*, Nos. 85-2061 & 85-2130 (Dec. 17, 1985).

[4] The fact that petitioner was permitted to receive retirement benefits at age 49 does not establish that his decision was involuntary, as petitioner contends (Pet. 46-48). A retirement may be involuntary for purposes of establishing eligibility for a discontinued service annuity even though the same retirement may be voluntary for purposes of determining whether a plaintiff may pursue an appeal. See *Covington* v. *Department of Health & Human Services*, 750 F.2d 937, 940 (Fed. Cir. 1984).

appeal, that she could be involuntarily separated or resign, and that she could apply for retirement benefits; nothing in the notice informed the plaintiff that she would lose her right to appeal by voluntarily resigning (*id.* at 38). As the Fifth Circuit observed (*id.* at 39), "the notice * * * as a whole indicated that she could *both* appeal and also *either* resign *or* accept involuntary separation and still receive retirement pay." In those circumstances, the court remanded for further proceedings to determine whether plaintiff's separation was a voluntary one. Here, by contrast, the court of appeals found that there was "absolutely no evidence that [petitioner] was coerced into retirement or misled as to the effect retirement would have on his rights" (Pet. App. 3).[5]

In any event, any arguable inconsistency between the Federal Circuit and the Fifth Circuit is of no continuing importance. Congress provided in 1982 that decisions of the Merit Systems Protection Board, with certain inapplicable exceptions, are reviewable only in the Federal Circuit. 5 U.S.C. 7703(b)(1). Therefore, cases like this one will not be reviewed in the regional courts of appeals in the future.[6]

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[5] *Gonzalez* is factually distinguishable as well. The plaintiff in *Gonzalez* was faced with a choice between a voluntary resignation and an involuntary retirement. Petitioner, in contrast, had the option of taking the aerospace engineer position that he was offered. Thus, it is clear that petitioner had a choice of options quite different than those afforded the plaintiff in *Gonzalez*.

[6] There does not appear to be any conflict between the Federal Circuit's decision in this case and other Federal Circuit decisions, as petitioner contends (Pet. 42-46). Relying on *Scharf* v. *Department of the Air Force*, 710 F.2d 1572 (Fed. Cir. 1983), and *Cov[illegible]* v. *Department of Health & Human Services*, 750 F.2d 93[illegible] (Fed. Cir. 1984), petitioner argues that

c. The remaining issue is whether the courts below properly permitted the government belatedly to raise the argument that petitioner was barred from appealing because he chose to retire. Although it is unfortunate that such a basic defect in petitioner's claim was not noticed promptly, the Claims Court correctly concluded, in light of its review of the long history of this case, that the government was not estopped from raising the argument. That fact-bound determination does not warrant review by this Court.

In addition, the Federal Circuit noted that the effect of petitioner's voluntary retirement was to deprive it of jurisdiction. An employee has a right, under 5 U.S.C. 7513(d), to appeal to the Merit Systems Protection Board challenging certain actions listed in 5 U.S.C. 7512. Voluntary actions are not subject to challenge, however. 5 C.F.R. 752.401(c)(3). The courts have frequently described the effect of a determination that a plaintiff voluntarily retired as depriving the administrative tribunal of jurisdiction, since a plaintiff has no right to challenge his

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he should have been advised that he would lose his right to appeal by accepting his annuity. In *Scharf*, the court did not decide whether there was any duty to counsel an employee about his options. 710 F.2d at 1575 n.3. In *Covington*, the court based its decision on the fact that the agency involved had provided "misleading and erroneous" information to the plaintiff. 750 F.2d at 942. While the court spoke of a right of employees to understand their choices (*id.* at 943), that right was violated by the agency by affirmatively misleading the plaintiff in *Covington*, an exception to the general rule recognized in *Taylor*, *Kestner*, and *Brown*, and not applicable here. See 750 F.2d at 943 ("[i]n this case, the agency was responsible for Covington's lack of an informed choice"). Of course, any conflict in the decisions of the Federal Circuit might warrant rehearing en banc by that court, but does not call for review by this Court.

own voluntary decision. See, *e.g.*, *Sammt* v. *United States*, Nos. 85-2061 & 85-2139 (Fed. Cir. Dec. 17, 1985), slip op. 5 (a decision to retire, when the plaintiff's option was to be involuntarily retired, nevertheless "deprives the Claims Court of jurisdiction"); *Taylor*, 591 F.2d at 693; *Kestner*, 229 Ct. Cl. at 774; see also *Burgess* v. *Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed. Cir. 1985) ("the issue of jurisdiction is intertwined with the merits of an action"). It is, of course, long-settled that a claim of lack of subject matter jurisdiction may be raised at any time and may not be waived. *Insurance Corp.* v. *Compagnie des Bauxite de Guinee*, 456 U.S. 694, 702 (1982); *Mansfield, C. & L. M. Ry.* v. *Swan*, 111 U.S. 379 (1884).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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